SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 27

FEDERAL TRADE COMMISSION,

Petitioner,

—v.—

FRED MEYER, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CLAIROL INCORPORATED, AS *AMICUS CURIAE*

WEIL AND LEE,
Attorneys for Clairol Incorporated, as amicus curiae.

GILBERT H. WEIL,
of counsel.

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Statement

By letters which will be filed with the Court along with this brief all parties have consented that Clairol Incorporated, a Delaware corporation with its principal office at 1290 Avenue of the Americas, New York, New York 10019, file a brief herein as *amicus curiae.*

Clairol's interest is as the respondent in a Federal Trade Commission proceeding (Commission Docket Number 8647). A final cease and desist order was issued against Clairol therein, based in part upon the same construction by the Commission of section 2(d) of the Robinson-Patman Act as is presented for review herein

(Commission's mimeo opinion, Docket #8647, pages 17-19;[1] and note petitioner's brief, page 14), and said order is pending now on appeal before the Court of Appeals for the ninth circuit (#21,235).

Summary of Argument

In order to answer affirmatively the question posed at page 2 of petitioner's brief (P.Br.), one must first neutralize the word "competing" in the phrase "customers competing in the distribution of such products or commodities" (Robinson-Patman Act, section 2(d), P.Br., p. 3). The verb "compete," in terms of trade, commonly means to seek to sell to the same prospective purchaser. In normal and natural contemplation, commercial or philological, wholesalers do not compete with retailers. This is commonly implicit in the concept that they occupy different functional levels. Petitioner, to succeed, must therefore sustain a burden of proving that Congress misused the word with the intention of conveying a meaning which other, easily available terminology would readily and undebatably have expressed by correct definition and ordinary understanding.

To acquit itself of this labor petitioner argues two propositions: 1) that the "basic purpose" of Congress was to have section 2(d) proscribe at least as much as does section 2(a) (implying that any wording in 2(d) to the contrary should be either disregarded or tortured into Procrustean consonance with such "basic purpose"); and 2) that "competing in the distribution of products" has a different meaning from competing in their "resale", so that the former covers wholesalers who sell to retailers who compete with direct-buying retailers.

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[1] A copy of the reference portion is attached, for the Court's convenience, as an appendix at pages 26-27, *infra*.

As to the first of these arguments:

The crucial premise is demonstrably faulty. For example, Congress included both primary and secondary line competition within the scope of 2(a), while it unarguably omitted the former from 2(d). Inescapably, then, Congress did not mean 2(d) to reach all that falls within 2(a). Any argument which depends upon that assertion for its foundation must topple.

Beyond that, the unmistakably marked differences in the plain language Congress used between 2(a) and 2(d) governing the very point in issue here shows that where it intended to regulate discriminations which might affect customers of an unfavored customer it knew how to say so explicitly, and did so ("... any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them." (Section 2(a), P.Br., p. 3.) It used no such language in 2(d). There are compelling commercial reasons for Congress to have made this differentiation, including possible destruction of the wholesaler system of distribution, or serious competitive injury to smaller retailers and manufacturers; and a mere assumption that it was inadvertent and unintended, so that petitioner is authorized to correct the statute by disregarding it, is unwarranted.

As to the second of petitioner's arguments:

In section 2(e) Congress used the word "resale" rather than "distribution." Petitioner recognizes that 2(d) and 2(e) should be read in harmony with each other (P.Br., p. 24, n. 19). While petitioner does now seem to urge that "resale" should be read as broadly as "distribution" (*ibid.*), it is plain that originally it appreciated the untenability of that, and hence necessarily contended for a critical differentiation between the two (P.Br., p. 14,

n. 9). In any event, even if "distribution" had been congressionally intended as a distinction in 2(d) from "resale" in 2(e), petitioner's argument still does not dispose of the requirement that there be competition between the favored and unfavored customers. Competition in distribution is not synonymous with engagement in distribution; its meaning is far narrower. Had Congress intended to put all customers who engage in a common channel or area of distribution on a par with each other for 2(d) and 2(e) purposes, it could readily have used that verb instead of "competing".

Argument

However they may be phrased or orchestrated, petitioner's arguments require a single basic hypothesis:

> That the word "competing" shall be read, insofar as section 2(d) of the Robinson-Patman Act is concerned, in a manner contrary to its normal meaning.

To compete is well understood as meaning to vie for the custom of the same prospective purchasers.[2]

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[2] "Competition

"1. Act of competing, esp. of seeking, or endeavoring to gain, *what another is endeavoring to gain at the same time; common* strife for the *same* object; * * * * * *

"3. *Com & Econ.* The effort of two or more parties, acting independently, to secure the custom of *a* third party by the offer of the most favorable terms; . . . ."

Webster's New Internationl Dictionary, 2nd Ed., 1960. (Emphasis added.)

"Competition

"Syn.—**competition** denotes a striving for the same object, position, prize, etc. . . . ."

Webster's New World Dictionary, College Edition, 1953.

(continued on next page)

Thus, before the respondent herein (Meyer) can be found to have induced violations of section 2(d) it must be established—unless the common and usual meaning of "competing" is rejected—that Meyer, the favored recipient of certain promotional allowances, sought to resell the relevant products to the same buyers as did the wholesalers who were not accorded such allowances.

However, since Meyer resells to consumers while the wholesalers resell to retailers, they do not compete with each other. Meyer competes with the retailers who buy from the wholesalers, but not with the wholesalers themselves.

Petitioner would surmount this obstacle to its case with the theory that despite what Congress said in 2(d), it

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"Compete

"1. To strive for something that is striven for at the same time by another; . . . ."

"Competition

"1. The act or proceeding of striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; * * * *

"2. *Polit. Econ. & Comm.* (1) The independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade."

Funk & Wagnalls, New Standard Dictionary of the English Language, 1963.

"Competition

"* * * The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms. It is the struggle between rivals *for the same trade at the same time;* the act of seeking or endeavoring to gain *what another is endeavoring to gain at the same time. Lipson* v. *Socony Vacuum Corporation,* CCA Mass; 87 F. 2d 265, 270."

Black's Law Dictionary, 4th Ed., 1951. (Emphasis added to definition.)

really meant that section to reach any differentiation in promotional allowances between customers of a supplier which might result in discrimination between larger and smaller retailers. It overtures this major theme by quoting a statement of this Court from *Broch*,[3] which is obviously over-generalized when read out of its context.[4]

Petitioner then rationalizes, apparently, that the specific wording Congress chose to particularize the conduct forbidden by section 2(d) need not be paid strict attention, since in essence it must have been meant to prohibit any activity which would be "anomalous" [5] to the Act's "basic

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[3] "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which larger buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." (P.Br., pages 8 and 13.)

[4] In *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133 (1944), and again in *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470, 480, n. 6 (1950) this Court warned the Bar against the use of its general statements in factual situations other than those particularly before the Court at the time of their utterance. *Broch*, involved section 2(c), not 2(d). Also, it did not present the Court—even so far as 2(c) was concerned—with any question of extension to tertiary, rather than secondary, line discrimination. Neither did *Simplicity*, *Lorillard*, nor *Arden* upon which petitioner also relies. (P.Br., pages 13, 23 and 24-25.)

A further element of inapplicability in certain of petitioner's citations may be here noted. Where, as in *Lorillard* (P.Br., p. 23) or House Report No. 2287 (P.Br., p. 13), reference is made to the use of "purported" promotional payments, which are but a "guise", or "evasive methods", a different situation is under contemplation from legitimate payments for promotional services actually rendered. When monies are paid purportedly for services which are not in fact performed, the excess of such remittances over the fair and reasonable value of the supposed promotional activities may be treated as an actual price discrimination. F.T.C. Guide #11, P.Br. (Appendix), p. 46; *American Cooperative Service Association* v. *Anchor Serum Company*, 153 F.2d 907 (7 Cir. 1946); cert. den., 329 U.S. 721 (1946), rehearing den., 329 U.S. 826 (1946). As such, it would be governed by 2(a) of the Robinson-Patman Act, which, in contradistinction to 2(d), expressly embraces tertiary line discriminatory effects (*infra*, pages 21-23).

[5] P.Br., pp. 18 et seq.

purpose",[6] and that, language or no language, section 2(d) should, therefore, be read at least as broadly as section 2(a).[7]

Apart from the fact, which will later be demonstrated at pages 15-23, that the language of section 2(d) simply does not allow the necessary tinkering to permit so undisciplined an enforcement of the Act,[8] petitioner's reliance upon its concept of the "basic purpose" of the Act, and upon a congressional intent to broad-stroke as unlawful anything which could not be reconciled therewith (i.e., which might be "anomalous" thereto), and upon an hypothesis that Congress meant to make 2(d) at least coextensive with 2(a), are all subject to critical deficiencies, which will now be discussed.

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[6] P.Br., pp. 8, 13-18.

[7] P.Br., pp. 9-10, 24-28.

[8] In an effort to find room within the terminology of 2(d) for its decision here, petitioner "relied upon the fact that 'the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale"' (R. 63) . . ." (P.Br., p. 14, n. 9). However, the two quoted words are, for section 2(d) purposes to be read alike (*infra*, pages 18-19), for "resale" is expressly used in 2(e), and petitioner concedes, "Despite some differences in the language of the two subsections . . . it is only logical that 2(d) and 2(e) be construed as having the same scope." (P.Br., p. 24, n. 19.)

1.

Congress did not enact in section 2(d) a general statutory proscription against any conduct which might violate a basic purpose as such.

Whatever may have been the underlying motivation that stimulated passage of the Robinson-Patman Act, Congress did not merely draft a free-form mandate. It particularized the activities it intended to proscribe, leaving unforbidden those not so interdicted. It did not simply write "It shall be unlawful to engage in any device by which larger buyers may gain discriminatory preferences over smaller ones by virtue of their greater purchasing power." It described the acts of discrimination it wished to prohibit, even expressly excluding therefrom some which quite obviously contravene what petitioner perceives as the "basic purpose" of the Act as generalized in the earlier quoted language from *Broch*.[9]

Thus, problems of 2(d) application are not to be solved by the simplistic device of outlawing any promotional allowance which results in larger buyers gaining a discriminatory preference over smaller ones, or which is inconsistent with what petitioner conceives to be the "basic purpose" of the Act. One must look to the language used by Congress to specify the form of conduct it elected to prohibit. If the questioned activity is not in that catalog it has been left lawful by Congress even though it might seem opposed in spirit to the abstract philosophy of the statute.

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[9] E.g., cost-justified discriminations [2(a)], and those granted to meet competition [2(b)], both of which commonly accrue to the benefit of larger rather than smaller purchasers. Note *F.T.C.* v. *Standard Oil Co.*, 340 U.S. 231 (1951), holding that the 2(b) exemption applies even though competition may thereby be actually injured.

2.

Congress did not intend section 2(d) to be at least as broad as section 2(a).

One of the major areas of price discrimination prohibited by section 2(a) is that which has impact upon primary line competition. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). Section 2(d) reaches this not at all. Geographic discriminations in promotional allowances are lawful under 2(d) regardless of how injuriously they may affect primary line competitors, since they are not barred if the secondary line favored and unfavored customers do not compete with each other (e.g., are in non-competitive geographic areas).

If Congress drafted 2(d) to fall so far short of 2(a) in a respect as important as this to the "basic purpose" of the Robinson-Patman Act, it plainly did not intend, as a blanket proposition, to echo in 2(d) for promotional allowances whatever it had already provided in 2(a) for prices. One is, therefore, relegated to the language of 2(d) itself for guidance as to its effect. Anomalousness with the "basic purpose" of section 2(a) can hardly predominate over wording as the ultimate criterion of 2(d)'s application when promotional discriminations remain lawful thereunder even though they seriously prejudice primary (but not secondary) line competition and hence would undoubtedly be illegal under section 2(a) if made in the form of price discriminations.

3.

There is sufficient reason for not extending section 2(d) to customers of customers that Congress's decision not to do so need not be looked upon as an aberration.

A host of anomalies may be evoked if one proceeds from the commercially unrealistic premise that wholesalers and retailers should be treated alike with regard to their promotional functions.

Their economic characteristics are too disparate, their business conditions too dissimilar, to permit their being arbitrarily pressurized into the same operational mold by legislative fiat.

Congress should not be lightly presumed to have been either ignorant or disregardful of so apparent a reality. More than enough reason exists to differentiate between wholesalers and retailers as occupants of different distributional levels (non-competing) that one cannot assume irrationality or implausibility in a congressional election to do so. Neither can one arbitrarily reject as meaningless the verbal evidence inherent in the legislative use of the readily understood term "competing" that such was its actual intent.

Congress may well have foreseen more harm than good resulting to smaller retailers (and smaller manufacturers as well) from mandating that wholesalers be treated equally with retailers under section 2(d).

It is clear, for example, that direct dealing between larger retailers and larger manufacturers is the product of natural economic laws. The size of such purchasers

justifies maintenance of a major sales structure by a vendor to tap their trade; and it is the bigger manufacturer who possesses the necessary resources for creating and operating such an arm.

It requires a wholesaler, on the other hand, to serve this purpose for smaller buyers and sellers. His economic function is to aggregate the demand of smaller customers and the supply of smaller manufacturers, joining them through the centralizing channel which he provides, and thus facilitating a flow of trade between them.

In short, the wholesaler constitutes an important medium whereby smaller retailers may have access to manufacturers, both large and small; and, reciprocally, for smaller manufacturers to reach retailers of varying sizes. It would, therefore, require an expression by Congress clear beyond the possibility of debate before an intent should be imputed to it to impede wholesaling in the name of protecting the competitive interests of smaller retailers. Yet that is what Congress could have thought might happen had it written 2(d) in the manner petitioner contends it should be applied.

To illustrate, the functional discount upon which the wholesaling operation subsists is justifiable only to the extent that manufacturers find it economical and productive to sell in that manner to wholesalers. If manufacturers were compelled to extend to wholesalers the same promotional benefits which they accord retailers, a major element of cost saving in trading with wholesalers would be nullified. Manufacturers could, in consequence, be expected to narrow the wholesalers' functional discounts which, in turn, would produce either an ominous diminishment of their profit margins or an increase in their prices to retailers.

Many manufacturers (particularly the larger ones) would find the additional costs and administrative burdens of operating promotional programs through both wholesalers and retailers so great that they might be compelled to stop dealing with wholesalers entirely in order to avoid such impositions.[10] Larger vendors, especially, would be able to rely upon their own sales forces to service the cream of the retailers, namely, those of large and medium size but their channels of distribution to the smaller retailers would then atrophy.

Access of smaller retailers to major manufacturers through wholesalers would suffer, and wholesalers, depleted of trade with larger manufacturers, might fall by the wayside.

Where the latter occurs, smaller manufacturers—who cannot afford to operate large sales forces of their own—would be left without adequate distributional avenues; and smaller retailers would lose them, also, as sources of supply.

Further, manufacturers who expect value received for the promotional monies they pay to retailers might well conclude they will not receive it from wholesalers, who do not have the trading contacts with consumers that is important to the success of such programs.[11] Rather than

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[10] It is inescapable that the policing, enforcement and other administrative burdens incumbent upon the supplier to make operation of petitioner's concepts feasible would involve substantial additional expense (P.Br., pages 33, 35, 36 and 38).

[11] In-store displays and promotional activities (and maintenance of adequate inventories to meet consumer orders) are important elements of most consumer packaged-goods cooperative promotional programs. Meyer, for example conducted sales meetings and sales contests to inform and offer incentives to its sales personnel in connection with the promotions involved in this case. It also prepared and constructed window displays and in-store displays, signs and banners (CX 6, 13, 18, 19, 200, 201; R. [Ct. of App.] 428-430, 692). Similarly, Clairol's "Sales Promotion

waste their money in payments to wholesalers in the lip service to §2(d) which petitioner demands, they might well be expected either to discontinue cooperative retailing promotions altogether or, as previously mentioned, by-pass wholesalers as a channel of distribution. Congress would not ordinarily be thought to have sought either of these consequences.

Moreover, for many product categories there are tens of thousands of retailers purchasing such items from whole-

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Agreement", involved in F.T.C. Docket #8647, attachment 92 to the stipulation of facts therein, provides, among other matters:

"1. Retailer will, in each store or department owned, operated or controlled by him, maintain stocks of the above products in sizes and quantities adequate to supply consumer demands and to provide the display required by paragraph 2 below.

"2. Manufacturer's products are to be displayed by Retailer in a good traffic location with such location and the size of the display to be at least as favorable as that given any competitive products. The space devoted to the display of each of the manufacturer's products as compared to the space devoted to competitive products will be at least proportional to Retailer's current sales volume for such manufacturer's products in said store or department as compared to the competitive products.

"3. Retailer will, in each store or department which Retailer's policy does not prohibit special display promotions and in which such display promotions are provided for competitive products, conduct special display promotions of manufacturer's products at least once in each quarter. Such special display promotions will be in addition to the regular display required by paragraph 2 above.

"4. Retailer agrees to use manufacturer's display material either of a permanent or temporary nature where policy permits, if such display material is used on any competing brands.

"5. Retailer agrees to permit manufacturer's representatives to take inventory of the entire line on every call if not contrary to Retailer's policy.

"6. If the issuance of bulletins to store personnel is a regular part of the Retailer's operation, manufacturer's current promotion will be included and a copy sent to manufacturer's Sales Department at 1290 Avenue of the Americas, New York 19, New York."

The wholesaling function has no room for such promotional activities vis-a-vis consumers (Cf. P.Br., p. 31).

salers. Individually, these accounts may be too small for the manufacturer to deal with economically. Nonetheless, he would be forced to incur many of the costs of doing so if, through the medium of their wholesalers, they must be extended all the manufacturer's promotional arrangements. He would have to examine and act upon hundreds of thousands of proofs of performance, invoices and documents to insure that the payments have been properly earned.[12] Thus, manufacturers might be forced to choose between eliminating either the promotional program or the wholesaler in view of the expense involved in policing and administering a cooperative program under petitioner's rules, if it should become mandatory to extend it to myriads of low-volume, relatively unproductive accounts, such as many who buy from wholesalers.

If it could be, and were, left to the wholesaler to handle such administrative deatils (P.Br., pages 31-35), the added expense of doing so would not thereby be eliminated. It would simply be shifted to the wholesaler, who would probably be less able, economically, to bear it than the supplier.[13] Either his own profit margin (already perilously

[12] Paragraph 11 of petitioner's Guides (P.Br., Appendix, pp. 45-46) reads: "11. *Checking customer's use of payments.* The seller must take reasonable precautions to see that the services he is paying for are furnished and also that he is not overpaying for them. Moreover, the customer must expend the value received in full solely for the purpose for which the allowances were given. If the seller knows or should know that what he pays or furnishes is not being properly used, the payments or services must be discontinued. It should be noted that payments by the seller where the customer performs no services may result in legal action against the seller under Section 2(a) of the Robinson-Patman Act and against the customer under Section 2(f) of that law. Likewise, a seller may not properly pay, nor may a customer receive and retain, any amount in excess of that actually used by the customer to perform the service."

[13] The supplier would still have to police to assure that the wholesaler is indeed passing on the benefits and sub-policing its customers in turn. And note the inordinate further expense implicit in implementing petitioner's concept of alternative available benefits (P.Br., pages 35-36):

slim in many cases) would be decreased *pro tanto,* or he would be compelled to pass on such costs in higher prices to the smaller retailers he serves (including those who do not even use or benefit from the promotional program). Congress may quite reasonably have wished to avoid a likelihood of precipitating such consequences.

Also, many retailers purchase a given product from more than one wholesaler. This would multiply correspondingly the administrative and policing burdens of the supplier. So, too, would the existence—which characterizes a number of industries—of additional levels of distribution, such as sub-jobbers and distributors, along with wholesalers.

Neither is it rationally to be presumed that Congress intended to put smaller manufacturers to the competitive strain which the petitioner's position would generate. At present, as illustrated by the case at bar, larger manufacturers who offer cooperative promotional programs to their direct buying retailers usually do not extend them to wholesaler customers as well. The smaller manufacturers who, as pointed out above, are more dependent than larger ones upon wholesalers to reach their markets are, therefore, not now faced with the expensive necessity of matching such promotional payments to wholesalers in order to meet competition. Petitioner's construction of 2(d), however, would change that, imposing an additional cost of doing business upon smaller manufacturers which might well prove critical for many of them.

Petitioner's bland posture that its construction of 2(d) is all to the benefit of the smaller retailer is, at its best, far too simplistic. The real economic probabilities point the other way. If they do not outweigh petitioner's rationale, they at least balance the scale, and dictate that there is no force to an argument that Congress must have intended to use the word "competing" in a strained and

unusual manner because only thus would salutary economic effects follow.

It is not so plainly a "reasonable and proper" interpretation of Congress's intent (P.Br., p. 8) which might likely lead to frustrational abandonment of cooperative promotional programs, or substantial discouragement of larger manufacturers from distributing through wholesaler channels. Smaller retailers will not be helped if their wholesalers are "protected" out of business.

4.

The language of section 2(d) precludes petitioner's construction.

The real question here is not whether petitioner's arguments are sound that Congress, to better accomplish the thematic purpose of the Robinson-Patman Act, should have mandated that wholesalers receive the same allowances under section 2(d) as retailers who compete with their customers. The issue, rather, is whether Congress chose to do so.

To answer that requires, under basic precepts of statutory construction, that the words the legislature used shall be taken in their common and usual sense, absent a most persuasive showing that they were intended to be abnormally read.[14]

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[14] A statute whose language is clear and not ambiguous must be given effect according to its words without resort to external aids of construction. " 'Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' " *United States* v. *Lexington Mill & Elevator Co.*, 232 U.S. 399, 409-410 (1914), quoting from *Lake County* v. *Rollins*, 130 U.S. 662, 670 (1889); see also *Helvering* v. *City Bank Co.*, 296 U.S. 85, 89 (1935).

There is no such demonstration here.

To the contrary, section 2(d) is part of the antitrust laws, and competition is a familiar concept in their context. Every facet of their administration prior to the Robinson-Patman Act had been consonant with the normal understanding of that term—i.e., the function of commercial rivalry between two or more sellers for the trade of the same customers. No application of the antitrust laws that *amicus* has been able to find, whether before or after the Robinson-Patman Act[15] has been predicated upon the bizarre assumption that a wholesaler competes with a retailer, except where the wholesaler sells to consumers as well as to the trade, and, to that extent, ceases to be a wholesaler.[16]

Every presumption must be in favor of the conclusion that when Congress chose "competing" to express its intent in section 2(d) [an addition to the antitrust laws] it did so with full knowledge of 1) the word's usual and clear meaning, 2) its meaning in antitrust usage generally, and, finally, that 1) and 2) are completely in harmony with each other.

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[15] With the exception of *Krug* v. *International Telephone and Telegraph Corp.*, 142 F. Supp. 230 (D.C.N.J. 1956), which will be discussed *infra*, pages 20-22.

[16] *L. & C. Mayers Co.* v. *F.T.C.*, 97 F.2d 365 (2 Cir. 1938); *Machen* v. *F.T.C.*, 126 F.2d 420 (2 Cir. 1942). Note *In the Matter of Federated Nationwide Wholesalers Service, et al.* (F.T.C. Docket No. 8649), CCH Trade Reg. Rep. ¶17,995 (1967):

> "In some instances, a merchant combines the functions of a wholesaler and a retailer, and sells both to resellers and to consumers. If a large proportion of such a merchant's sales are made to consumers on a regular basis, the use of the term 'wholesaler' as above defined, may be misleading and deceptive. Such a merchant functions as a wholesaler when selling to resellers and acts as a retailer when selling to consumers. Under such circumstances, we recognize that the merchant is performing a dual role and is a hybrid of some sort. Thus, a representation that such a seller is a wholesaler is not entirely true." (At page 20,371)

Did Congress, then, suddenly intend that for 2(d) purposes the word should bear a meaning it had never carried before? Yes, says the petitioner, because Congress stipulated competition *in the distribution* rather than in the resale of the affected products (P.Br., p. 14, n. 9).

If nothing else, this argument would seem to accept that if "distribution" in section 2(d) is used as the equivalent of "resale" in section 2(e) petitioner has no case.

And, indeed, that is the very situation, for it cannot be doubted that minor variations in language between 2(d) and 2(e) are devoid of substantive significance.[17]

> "It seems clear, upon a study of these sections, that Sections 2(d) and 2(e) are companion sections and that distinctions between them should not be drawn merely because of the differences in terminology employed in each section." *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, 154 F. Supp. 471, 474 (N.D. Ill. 1957 E.D.), *modified on other grounds*, 258 F. 2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

Note the discussion in Rowe, Price Discrimination Under the Robinson-Patman Act, §13.9 "Reconciliation of disparities in Sections 2(d) and 2(e)" pp. 390-391 (1962, and Supp. 1964), which he introduces with the paragraph:

> "Although the text of Sections 2(d) and 2(e) contains a spate of semantic discrepancies, courts view these provisions as reciprocal bans of coextensive scope irrespective of minor textual variations."

Revealingly, it does not even occur to Rowe, in listing the "semantic discrepancies", to mention the variants "dis-

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[17] As petitioner appears to concede (*supra*, p. 7, n. 8).

tribution" and "resale". Corroborative of the fact that this is a difference which has not struck anyone as being meaningful (and especially pertinent to the issue here) are cases which use "resale" whether discussing 2(d) or 2(e):

> "Section 2(d) of the Robinson-Patman Act prohibits *payments* to one's customer as compensation for services or facilities furnished by the customer in connection with his resale of the merchandise unless the payments are available on proportionately equal terms to all customers competing in the resale." *Empire Rayon Co.* v. *American Viscose Corp.*, 238 F.Supp. 556, 560 (S.D.N.Y. 1965) *revs'd on other grounds* 354 F.2d 182 (2 Cir. 1965) subsequently reinstated and affirmed after reargument before the court *en banc*, 364 F.2d 491 (1966), cert. den. 385 U.S. 1002 (1967); see also *Exquisite Form Brassiere* v. *F.T.C.*, 301 F.2d 499, 500 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1548 (June 29, 1956).

Even beyond that, however, "competing in the distribution of such products" is a compound prerequisite, each component of which must be satisfied before violation can be found. Even if "distribution" were not the equivalent of "resale", it would still be necessary to find the existence of *competition* between the favored and unfavored customers; and, as the Court of Appeals held, no normal employment of that term can envisage, on the one hand, retailers (who sell to consumers), and, on the other, wholesalers (who sell to retailers) in such a relationship to each other.

It is not disputed that the wholesalers in this case were engaged in the distribution of certain products, and that Meyer was also engaged in the distribution of the same

products, but to engage in is not necessarily to compete.[18] The manufacturers and suppliers also engage in the distribution of the same products, but that does not establish them as competing with retailers. If Congress had intended that common participation in the distribution process should be enough to require that wholesalers and retailers be treated equally under 2(d), it could readily have written "engaging". That would easily and clearly have manifested an intent to exceed the bounds theretofore and ordinarily connoted by the chosen verb, "competing".

There is but one decision favoring petitioner's position: *Krug* v. *International Telephone & Telegraph Corp.*, 142 F.Supp. 230 (D.C.N.J. 1956).

It explained its holding as follows:

> "On the one hand, it would, upon first reading, seem that the language chosen by Congress for Section 2(d) is more limited than that for Section 2(a). The latter embraces within the area of competitive protection 'Different purchasers * * * or * * * customers of either of them', while the former uses the phrase 'customers competing in the distribution' of a particular product. On the other hand, it would seem that Congress intended by Section 2(d), as well as by Sections 2(c) and (e) for that matter, to prevent circumvention of the prohibitions of Section 2(a) by the employment of alternatives for price concessions. * * *
>
> "It is concluded that the purpose of Section 2(d) is to place discriminatory allowances on the same basis as price discriminations prohibited by Section 2(a) and that consequently the same set of circumstances give

[18] This is the fallacy of petitioner's "conduit" argument (P.Br., p. 17). Everyone, from manufacturer (if not sub-manufacturers of components) to ultimate consumer, is part of the "nexus" (*ibid.*) of distribution. But only those at the same functional levels within the "distribution network" (*ibid.*) compete with each other within the untortured meaning of the word.

> rise to a cause of action under Section 2(d), if the discrimination takes the form of unequal allowances or services, as would be the case if discrimination were a direct price discrimination under Section 2(a). This means that violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer." At page 236.

This reasoning, however, disregards the fact that Congress expressly differentiated section 2(a), on the one hand, and sections 2(d) and 2(e), on the other, in substantive respects of major importance. For example, discrimination alone is not forbidden by 2(a) (there must also be a likelihood of competitive injury), while under 2(d) and 2(e) discrimination is, without more, a (*per se*) violation. Further, there are defenses to section 2(a), namely, cost justification and changes in product market or marketability, which do not pertain to either 2(d) or 2(e). Similarly, and of major importance, 2(d) and 2(e) do not embrace primary line competitive impact (*supra*, p. 9).

Thus, there is clear evidence that although 2(d) and 2(e) may have been congressionally intended to frustrate certain evasions of 2(a), it does not necessarily follow therefrom that Congress conceived them to be mirror images of each other. The substantial differences in the language Congress chose to express its intent as between 2(a) and 2(d) may not be peremptorily brushed aside.

It would seem quite plain, as the above quotation from *Krug* starts by conceding, that Congress meant section 2(a) to reach tertiary line injury (" . . . competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them") but was content to embrace only the secondary

line where 2(d) and 2(e) were concerned (" . . . unless such payment or consideration is available upon proportionally equal terms to all of the customers . . ." and " . . . upon terms not accorded to all purchasers . . .").

Emphasis is added to this recognition of the legislative intent by the ease with which Congress, had it meant the contrary, could have either incorporated promotional allowances and facilities along with price in section 2(a), or have included an "or customers of them" phrase in sections 2(d) and 2(e), as it did in 2(a).

In *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505 (1963) this Court observed:

> "Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in §2(b) if the defense available thereunder were similarly intended to be broadly read. . . . There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in §2(b) the same broad meaning . . . which it explicitly provided by inclusion in §2(a); the reasonable inference is quite the contrary." (At pages 514-515).

With little more than substitution of section 2(d) for the quoted reference to section 2(b), that language paraphrases, and the underlying thought certainly applies to the point here under discussion. In section 2(a) Congress showed that it knew how to expand the applicable concept of competition beyond the level of the seller's customer. It is reasonable to conclude that like clarity of expression would be present in section 2(d) if the reach thereof was similarly intended to be broadly read. There is no reason applicable on the face of the statute to assume that Con-

gress intended to invoke by omission in section 2(d) the same broad meaning which it explicitly provided by inclusion in section 2(a).[19] The reasonable inference is quite the contrary.

A fortiori, to reach the opposite conclusion in this case would require not only a disregard of the difference between omission and inclusion, but would also necessitate imposing a strained and extraordinary meaning upon the word Congress employed to denote its intent, i.e., "competing".[20]

Recapitulation

The qualifying phrase "competing in the distribution of", as used by Congress in section 2(d), especially when read against the markedly different (by express addition)

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[19] At pages 16-17 of its brief (n. 12), petitioner performs the intriguing gyration of starting with the premise that "competition" does not mean the same thing for the different purposes of the different sections of the Robinson-Patman Act, and concludes therefrom that it should be read the same in section 2(d) as in 2(a). We agree that the competition dealt with may be different for the various sections, but only because Congress explicitly used different language to denote what it particularly intended in each. Thus, in 2(a) it expressly stated that the competition to be protected included that between customers of customers. In 2(d), however, it equally patently limited its proscription to discriminations between customers who compete with each other, and did not extend it to situations where competition exists only with respect to customers of either of them.

[20] How strained is indicated by petitioner's evident feeling of necessity to support its position by making out a case for competition between Meyer and a "wholesaler-retailer distribution system" (P.Br., pages 8, 9, 15 and 18). Section 2(d) does not, of course, prohibit discriminations between a customer and a system. It provides only for equal treatment as between customer and customer *if* they compete with each other. If a non-customer has to be brought into the picture in order to create the pre-requisite status of competition, it seems obvious that such condition does not exist with regard to a customer. Petitioner's semantics betray an awareness that competition does not truly describe the status between customer wholesaler and customer retailer, but only between customer retailer and non-customer retailer.

wording of section 2(a), "or with customers of either of them", is not so ambiguous as to call for external aids to its construction. Taken at face value, in accordance with its customary and usual understanding, it does not extend the prohibitions of 2(d) beyond discriminations between customers who vie with each other to resell the relevant product to the same potential buyers.

Petitioner has not convincingly shown so clear a congressional intent to the contrary of the language it actually used as to require that it be construed other than according to the normal and natural meaning of its terms. The argument that the tertiary line regulation of discrimination which Congress expressly wrote into section 2(a) should be deemed included in 2(d) as well, despite its conspicuous omission therefrom, because Congress presumably intended 2(d) to be at least co-extensive with 2(a), founders upon the indisputable evidences that Congress, to the contrary, meant the two sections to be different from each other in a number of respects, using significantly individualized language in them (including that pertinent to this case) to effectuate such distinctions. Rather, good reasons, which might well have appealed to Congress, exist to call for limiting 2(d) to customers who do compete with each other (in the normal meaning of the word).

In sum, petitioner's case depends upon the propositions that, in the portion of the statute governing the issue here, Congress did not mean what it did say, and did mean what it did not say. Far more by way of substantiation than has been shown here should be required to carry such a contention to success.

CONCLUSION

The decision of the Court of Appeals herein should be affirmed.

Respectfully submitted,

WEIL AND LEE,
Attorneys for Clairol Incorporated, as amicus curiae.

GILBERT H. WEIL,
of counsel.

APPENDIX

The remaining issue on appeal relating to the coverage of the Act is whether a failure to make available promotional payments to wholesalers whose customers compete with direct purchasers receiving such payments is actionable under Section 2(d). A decision on this issue is not decisive on the question of whether an order should issue. Actionable discriminations between customers purchasing directly from Clairol are documented on this record, both with respect to cooperative advertising payments to beauty salons and to payments for push money and demonstrators to Gray Drug Stores in Cleveland, Ohio.[21] Nevertheless, an expression of the Commission's views on this subject is required in the light of two recent decisions by the Ninth Circuit, namely, *Fred Meyer, Inc.* v. *Federal Trade Commission*, —— F.2d —— (9th Cir. 1966), and *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F.2d 694 (1964). We recognize that the decision of the Ninth Circuit in those cases sustains the position of respondent on this point and, if upheld, will prevent further action by the Commission under Section 2(d) to ensure equality of treatment with respect to promotional payments for a wholesaler and his customers who compete with direct buying retailers receiving such payments. The Commission nevertheless believes that in view of the importance of this issue it should adhere to the position originally taken in its decision in *Fred Meyer, Inc.*, Docket No. 7492

[21] It is only in the case of the promotional payments amounting to 5% of the purchases made available to Clairol's direct purchasing chain drug store customers in the Baltimore, Washington and Philadelphia areas but not made available to wholesalers whose customers compete with such favored customers where a ruling granting respondent's appeal and reversing the hearing examiner on this point would preclude the imposition of a cease and desist order. The initial decision fully covers this promotion as well as the payments to Gray Drug Stores and there is no need to again go over that ground in this opinion.

(1963), *modified,* —— F.2d —— (9th Cir. 1966). There we held that the statute is applicable to actual competitors without limitation by differences in the functional levels at which they operate. This construction of the statute, we believe, is in accordance with the language of the Act, is necessary to effectuate the Congressional purpose in enacting it, and is supported by the decision in *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J. 1956). In this connection, we note again that Section 2(d) speaks of competition in the distribution of products and not merely of their resale. A narrower construction of the statute would inevitably lead to inequitable discrimination and place in peril the entire structure of independent food merchandising, including the traditional wholesaler and his numerous small retailer customers who would be placed completely outside the pale of the Act insofar as their competition with direct buying chains is concerned. As we noted heretofore, in *Fred Meyer,* it would conflict with economic reality to apply the prohibitions of Section 2(d) to direct buying retailers only and to ignore the fact that wholesalers compete in redistribution with integrated chains and that customers of such wholesalers compete with direct buying chains on the retail level. It would be a strange result where, as a practical matter, in this case and in other cases the protection of the statute would be applicable only to the chains but denied their smaller competitors. In view of the importance of the issue, the Commission has requested the Solicitor General to file a petition for certiorari in the Supreme Court on this point in *Fred Meyer.* In the meantime, we will adhere to our earlier ruling on this issue announced in that case.*

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* Commissioner Elman did not concur in the request to the Solicitor General asking him to file a petition for a writ of certiorari for the Commission in *Fred Meyer.*